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“THE TANGLED COMPLEXITY OF THE EU CONSTITUTIONAL PROCESS” A SYMPOSIUM

(eds.)

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Staging conflicts in the context of constitutional complexity

31

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One of the most common criticisms leveled against European constitutionalism (and European legal scholars) is to be prone to a peaceful representation of the European legal system as a multi-level structure where rational actors kindly discuss intra- and between levels in search for proper solutions in a complex institutional environment.² *The Tangled Complexity of the EU Constitutional Process* claims that this is at best a caricature of European constitutionalism and it provides a challenging re-interpretation of European constitutional integration as a complex conflict-driven evolutionary process. Martinico points at the dialogues or clashes between courts which have marked the development of the European Union as the leverage which has allowed a robust European constitutionalism to flourish thanks to (and not despite) major constitutional struggles. Accordingly, at the core of the volume lies the intuition that the clashes between courts, and in particular between the ECJ and national constitutional courts, have not weakened the normative appeal of European constitutionalism. To the contrary, Martinico's idea is to show how the space for a peculiar kind of supranational constitutionalism was opened up precisely by these judicial interactions and sometimes disagreements. Martinico stresses the central position of constitutional conflicts when he notes that they 'are physiological and that they can play a systemic role, favoring the changing nature of the EU legal order. In other words, constitutional conflicts are functional to the development (not to be understood in a deterministic manner) of the EU legal order' (p. 51). This repeats an old republican insight (Machiavelli), the commonwealth's health is preserved through internal struggle among factions.

From a constitutional perspective, the volume reacts against two trends and by doing so it stands firmly within the field of constitutional pluralism. On the one side, Martinico argues against those reconstructions of European constitutionalism which are too lenient toward a

¹ Lecturer in Legal Theory at the University of Glasgow. References to pages from G. Martinico, *The Tangled Complexity of the EU Constitutional Process*, Routledge, Abingdon, 2012, will be between parentheses in the main text.

² In the Italian debate, see M. Luciani, 'Costituzionalismo irenico e costituzionalismo polemico', *Giurisprudenza costituzionale*, 2006, pp.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

32

congratulatory account of the history of integration.³ These constitutional narratives do miss the point of EU constitutional developments and tend to forget how difficult the affirmation of foundational principles like supremacy and direct effect has been in European history. In other words, these narratives overlook the pluralist dimension of the European legal order, which finds legal recognition in principles like the protection of national constitutional identities.⁴ The European constitutional order, suggests the author, is the outcome of a piecemeal process, but not of an irenic progress. If constitutional conflicts are the engine of European constitutional transformation, then the main point of both the admirers and the critics of a reductive understanding of the nature of European constitutional process loses its force. On the other side, the author criticizes the decoupling of the ideas of constitutionalism and pluralism, as recently advocated, for example, by Nico Krisch.⁵ Martinico does not accept the idea that these two terms are mutually exclusive: they are rather complementary and mutually supportive. The key point for avoiding this decoupling is to separate the concept of constitution from the concept of constitutionalism. The latter does not need to impose a hierarchy, but simply to tackle in a specific and limiting manner with political power, a requirement which pluralism alone cannot meet. In this regard, Martinico buys into Miguel Maduro's conception of constitutionalism as 'fear of the many' and 'fear of the few'. But given the nature of European constitutionalism, pluralism is also necessary for ensuring the respect of the basic units of the whole constitutional order. Behind these criticisms emerges Martinico's support for supranational constitutionalism, that is, a constitutionalism that does not belong by definition only to the national State level, but thanks to the openness of the post WWII constitutions, can be extended beyond (or, sometimes, below) it.⁶

The underlying assumption is that supranational spaces can also provide a forum for constitutional conflicts. This brings to the pivotal section of the volume, where the author reconstructs a typology of constitutional conflicts in the history of European constitutionalism and how they have affected and shaped the interpretation of the principle of primacy. The conflicts that concern Martinico have their own grammar, which, in this case, is constituted by the recognition of fundamental rights as norms shared by the common constitutional traditions.

³ I. Pernice, 'Multilevel Constitutionalism in the European Union', in *European Law Review*, 2002, pp. 511-529.

⁴ Cf G. Jacobsohn, *Constitutional Identity*, Harvard University Press, Cambridge Mass., 2010.

⁵ N. Krisch, *Beyond Constitutionalism*, Oxford University Press, Oxford, 2010.

⁶ For an excellent overview of this debate see M. Loughlin, P. Dobner (eds), *The Twilight of Constitutionalism*, Oxford University Press, Oxford, 2010.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

33

In other terms, there is an overlapping legal zone within the European legal orders which represents the premise for conflicts. The author pinpoints four kinds of judicial conflicts: 1) conflicts over the interpretation *stricto sensu* on a shared and accepted principle (*Rodriguez Caballero, Cordero Alonso*); 2) conflicts generated by the double role that ordinary courts are asked to perform (*Winner Wetten, Filipiak, Federfarma*); 3) conflicts generated by decisions threatening the monopoly over national constitutional interpretation (*Mangold, Küçükdeveci*); 4) conflicts generated by antinomies between European law (as interpreted by the ECJ) and national constitutional provisions (*Kreil, Michanicki*). As the reconstruction of these kinds of constitutional conflicts shows, the ‘dialogue’ between courts has indeed produced many consequences, some of an uncertain nature, other of a more positive outcome. But where its impact is mostly visible is in the re-definition to which the very principle of primacy has been subjected since the inception of the first conflicts. As it is interpreted after *Omega* and *Schmidberger*, the concept of primacy now recognizes two exceptions: the first is foundational, meaning that fundamental rights in the common constitutional traditions become the premise of the principle of primacy; the second exception, confirmed by article 4 TEU, concerns the non-shared principles of a single constitutional order.

The point of this excursus is to show that these conflicts are at least potentially capable of producing systemic changes in the European constitutional order. These changes are also functional to the protection of two important goods, which can be connected to the author’s peculiar style of constitutional pluralism. Conflict serves as a strategy for protecting rights from power, discharging in this way the accusation that European constitutionalism is not really constitutionalism since it does not tackle with the limitation of power. Conflict also protects pluralism because it works according to dialectic logic. In other words, it implies a perspectival account of human interaction. When one actor is aggressively challenging an interpretation of a fundamental principle or right, other actors are called to react and reach for a balance. From this perspective, even acute forms of judicial activism may be cunningly understood as rational. The adjective cunningly is justified because, as it will be noted below, Martinico does not read the constitutional dimension of European integration as a full-fledged intentional plan, but rather as the unpredictable outcome of constitutional conflicts.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

34

The arguments presented in support of this interpretation are challenging and they certainly enrich the debate on constitutional pluralism.⁷ The attempt to stress the active role of conflict in the European Union is to be praised because it introduces an original perspective which is rarely taken up even by constitutional pluralists. However, the key role played by constitutional conflicts appears as problematic once two essential tenets of Martinico's argument are taken into account. On a first level, the volume does not address the properties and methodology which make conflict valuable. In fact, Martinico claims that within a certain framework, a harsh conflict taking place in the judicial realm can be beneficial for the whole Union. But no explicit criteria are given in order to draw a distinction between good or bad conflicts. One might ask: Can any argument advocated by a constitutional court be opposed to other interpretations of the principles of European constitutionalism? And does this confrontational logic require the proliferation of conflicts for the sake of the polity? Nonetheless, an implied answer can be found by reading between the lines of the volume. In light of the author reference to Mouffe's conception of conflicts in her idea of agonistic democracy,⁸ it seems that conflicts ought to be tackled with in a constitutional way in order both to manage them and to render them productive: 'Conflict, in Mouffe's view, is not a violent clash but dissent respectful to the other and to the democratic institutions; conflict is not necessarily subversive but loyal to a context which shares some values without being necessarily homogenous [...] but which composes a common symbolic framework' (115).

This is a precious insight because it is supposed to prove that conflicts ought not to be concealed and, by their political staging, they should prove that society is not reconciled.⁹ From this point of view, constitutional conflict is the 'efficient secret' of the European constitution because it creates a common symbolic framework to which European constitutional judges can make reference when adjudicating conflicts between rights. Clearly, this common framework allows for interpretive disagreements which, in the author's intention, should reproduce conflict at the judicial level. A common symbolic framework is the precondition for productive constitutional conflicts. However, on a second, and perhaps most important level, the

⁷ For a useful overview of the debate see J. Komarek, M. Abelj (eds), *Constitutional Pluralism in the European Union and Beyond*, Hart, Oxford, 2012.

⁸ C. Mouffe, *On the Political*, Routledge, London, 2005; cf. A. Schaap (ed.), *Law and Agonistic Politics*, Ashgate, 2009.

⁹ The role played by conflicts distinguishes Martinico's brand of constitutional pluralism from Mattias Kumm's: see 'The Jurisprudence of Constitutional Conflict:

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

35

institutional translation of conflict as presented in the volume does not ensure that conflict will produce social and political integration because the ‘dialogue’ between courts does not seem able to make visible the positions involved in the conflict.¹⁰ Resorting again to an old republican insight, conflict can produce social integration if it makes public why and how the positions involved in the clash are visibly opposed. The underlying interests and their re-shaping as part and parcel of the common interest need to be articulated from different perspective. By staging dissent in a public way, which can be either deliberative or representative,¹¹ participants in the conflict feel that their positions and ideas have been treated fairly and that their claims were taken into account.¹² For this reason, in order to stage conflict and make it visible, claims need to be voiced publicly and to be put in a connection with the underlying societal structure.¹³ Even though it is difficult to group all forms of judicial review within the European space in one single form of rationality, it is still counterintuitive to presuppose that, for example, an adversarial style of adjudication where individual rights are pitted against the public interest would represent an ideal staging for constitutional conflicts. Paraphrasing the expression that the author coined in a series of previous works,¹⁴ what is really described here is something closer to a ‘hidden conflict’, where one of the actors involved is a – at least for most of the European public – remote institution located in Luxembourg.

Another problematic feature connected to the absence of publicity in this conception of constitutional conflicts lies in the gap between the idea of constitutional change and the intentions moving the actors involved. Martinico claims that since these conflicts take place in the evolutionary mode of constitutionalism, they are based on actions, but not on deliberate planning. This means that conflicts are still actively produced by agents, but their actions are not necessarily undertaken with a view of producing a legal or constitutional change. One may

¹⁰ It should also be noted that the majority of the literature on constitutional pluralism concentrate on constitutional courts as if they were present in all Member States’ constitutional orders. For an example of different style of judicial review see J. Husa, ‘Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective’, in *American Journal of Comparative Law*, 2008, pp. 345-388.

¹¹ See the reconstruction by S. Rummens, ‘Staging Deliberation’, in *Journal of Political Philosophy*, 2008, pp.

¹² This is the core intuition behind the central role of disagreement in J. Waldron, *Law and Disagreement*, Oxford University Press, Oxford, 1999. Waldron concedes too much to the idea of reasonableness. For a more radical perspective, see J. Rancière, *Disagreement*, University of Minnesota Press, 2008; E. Christodoulidis, ‘Against Substitution’, in N. Walker, M. Loughlin (eds), *The Paradox of Constitutionalism*, Oxford University Press, Oxford, 2007, pp. 228-245.

¹³ Cf N. Urbinati, *Representative Democracy*, Chicago University Press, Chicago, 2006.

¹⁴ See, for example, G. Martinico, ‘Judging in the Multilevel Legal Order: Exploring the Techniques of Hidden Dialogue’, in *King’s Law Journal*, 2010, pp. 257-281; id., *L’integrazione silente*, Jovene, Napoli, 2008.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

36

wonder, then, whether a conflict brought about by agents that do not intentionally look for legal change is still normatively attractive. But in the economy of the argument, this is a critical tenet: ‘the action and the role of the agent would not be excluded from the constitutional dynamics but these actions are not performed with the intent of producing a legal change’ (p. 71). In other words, what is at stake here is a peculiar dynamic of evolutionary constitutionalism, where human action is still relevant, but there is no recognition of institutional design and planning. This is the main difference, for example, between the idea of constitutional synthesis and Martinico’s understanding of evolutionary constitutionalism.¹⁵ To explain this crucial point, Hayek’s distinction between spontaneous and constructed orders is conjured up. Indeed, Hayek states that ‘spontaneous orders are the result of human action but are not the result of deliberate design’.¹⁶ As it is known, Hayek postulates that courts are the institution of spontaneous orders and Martinico seems to accept this view as a premise of his reconstruction. At this stage, in order to understand Martinico’s point one has to look at the other key notion introduced in the book: constitutional complexity. Introducing the idea of complexity in the debate on the European constitution is indeed a rather original and unprecedented move. Complexity is actually the most helpful notion for describing the process of European integration. A distilled conception of complexity (not to be confused as a synonym of complicated) is defined in the book in the following terms: ‘from a preliminary and general comparison between the different meanings of ‘complexity’, as used in several disciplines, it is possible to ‘extract’ a common meaning of complexity as a bilateral and active relationship between diversities. This definition is very generic but it has also two merits: it recovers the etymological sense of this concept and, at the same time, it acknowledges the importance of a multidisciplinary approach to ‘capture’ the hidden dimension of the European process’ (p. 37). Complexity best describes the secret of the European constitution because it accounts for a ‘multilevel situation where the legal orders

¹⁵ Cf. A. Menéndez, J. Fossum, *The Constitution’s Gift*, 2011 (‘Constitutional synthesis is different from evolutionary constitutionalism in the sense that there is always an agent [be it the legislature or the judiciary] behind the process of fleshing out the concrete implications of the regulatory ideal of a common constitutional law’). Martinico seems closer to Anne Peters’ approach; in fact, he quotes the following passage in an approving way: ‘That idea of constitutional evolution is a highly suitable explanation for the legal events on the European level. They may be characterized as ‘creeping constitutionalisation’ in contrast to ‘constitutional engineering’. In terms of political theory, it is an evolutionary, not a revolutionary occurrence: Constitution by evolution [...] The concept of constitutionalisation implies by necessity that this process is a continuing one’: A. Peters, ‘The Constitutionalisation of the European Union’, in W. Wessels, P. Riekman (eds), *The Making of a European Constitution. Dynamics and Limits of the Convention Experience*, VS Verlag für Sozialwissenschaften, Wiesbaden, 2006, p. 47.

¹⁶ F. Hayek, *Law, Legislation and Liberty*, Routledge, London, 1973, p. 37.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

37

are not only distinguishable but also ‘interlaced’ (p. 38).¹⁷ The relational and diversity-based character of the ‘complex’ European constitution is grounded on four features which seem to be compatible only with a form of evolutionary constitutionalism: non-reversibility; non-reducibility; unpredictability; non-determinability. These features also show why constitutional conflicts might provide a channel for the formation of spontaneous orders since they (1) build on previous traditions and customs, (2) they allow, through judicial dialogue, to take into account the multilevel nature of the European constitution, (3) they cannot anticipate the outcome even if the initial state of the components of the conflict are known, (4) they cannot be explained away according to a deterministic logic of cause/effect. Yet, the connection between complexity and constitutional conflicts might also be seen from another perspective which undermines the value of evolutionary constitutionalism and judicial dialogue. The emergence of a spontaneous order might be re-interpreted against the working of a multi-level form of governance whose main objective is not the staging of constitutional conflicts but the transformation of States’ constitutions and political systems.¹⁸ The constitutional dimension of European integration might be read not as an evolutionary achievement stemming out of constitutional conflicts, but as a way to hamper the emergence of these conflicts by undercutting the preconditions which make the latter possible. More specifically, constitutional conflicts are harnessed to the underlying logic of budgetary constraints and financial austerity. The risk is that the openness of national constitutions is exploited as a way to obtain further integration and centralization in a way which will neutralize the political dimension of future conflicts.¹⁹ The provisions enacted to cope with the financial and economic crises of 2008 (the so-called new economic governance)²⁰ do seem to point toward this direction and, while they are bringing about an important change in the EU constitutional development, they are everything but unintentional and direction-less.²¹

¹⁷ An example of the synallagma generated by constitutional complexity is the doctrine of the common constitutional traditions ‘since they are the outcome of the comparison and selection of the national constitutional materials’ (p. 44).

¹⁸ See, for this interpretation, C. Bickerton, *European Integration*, Oxford University Press, Oxford, 2012.

¹⁹ An interesting piece of case law for Martinico’s argument could be provided by the recent preliminary reference of the German Federal Constitutional Court to the ECJ on the case of Outright Monetary Transactions (for a first series of comments, cf the special issue of the German Law Journal 2/2014).

²⁰ M. Adams, F. Fabbrini, P. Larouche (eds), *The Constitutionalization of European Budgetary Constraints*, Hart, Oxford, 2014.

²¹ W. Streeck, ‘Markets and Peoples: Democratic Capitalism and European Integration’, in *New Left Review*, 2012, p. 70.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

Despite these concerns, Martinico's contribution is extremely relevant for at least two reasons. The first is that it invites to shed light (in a literal sense) over the hidden dynamics of constitutional conflicts. Enhancing the understanding of what is at stake in constitutional conflicts and unpacking the actors' behavior within the conflict itself represent an important first step toward the demystification of irenic views of European constitutionalism. This work represents also an invitation to further develop the analysis of these dynamics beyond judicial interactions. Second, the field of constitutional conflicts is far from being exhausted. To the contrary, as the author rightly notes in the last chapters, constitutional conflicts will predictably increase in the future because of four factors: 'the accession to the European Convention of Human Rights, the enlargement to the East, and the financial crisis and the consequences (one might say, the aftermath) of the roar of the mega-constitutional politics of the season of the Conventions' (pp. 164-165)'. The opportunities (and the urgency, it must be added) for further exploring the nature and the logic of constitutional conflicts won't be missing. In light of the new economic governance of the Eurozone and the foreseeable reactions coming from national constituencies, it is easy to predict that this is only the beginning of a lasting debate.